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Supreme Court of the United States

October Term, 1976
No. 76-691

DANIEL THOMPSON,
Petitioner,

vs.

EDWARD GAFFNEY, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

In addition to the questions submitted by the petitioner, the following question is submitted:

Where a petitioner, on direct appeal from a state criminal misdemeanor conviction has knowingly failed to petition this Court for a writ of *certiorari* and immediately thereafter commences a collateral *habeas corpus* attack in the federal courts, should this Court, considering the "substantial societal costs" of collateral attacks, allow a writ of *certiorari* to issue for the review of the same issues that could have been presented to this Court originally.

(While respondents object to the phrasing of the questions presented by the petitioner, and to several substantial incorrect factual statements contained therein, they feel that questions generally state the issues that this Honorable Court would be reviewing if it allowed the petitioner his writ of *certiorari*.)

STATEMENT OF THE CASE

On February 25, 1972 Daniel Thompson, the petitioner, was convicted by a jury of the Cleveland Heights Municipal Court of violating the municipality's disorderly conduct ordinance. (No verbatim record was taken at the trial, but a Statement of the Evidence was filed by the trial court (Petitioner's Appendix G, pp. 28a-31a), the contents of which are not disputed by counsel for the petitioner.)

On June 7, 1973, the Court of Appeals of Ohio (Eighth District), affirmed the verdict of the jury and the judgment of the trial court.

After the Court of Appeals denied Mr. Thompson's motion for reconsideration, he filed an appeal of right and a motion to certify the record with the Supreme Court of Ohio. On October 12, 1973, the Court dismissed his appeal and overruled the motion to certify. A request for a rehearing was denied by the state high court on November 8th.

The petitioner applied for, and received, from the United States Supreme Court a stay of execution of sentence pending the disposition of a petition for a writ of *certiorari*. However, no petition was filed within the jurisdictional period and on February 8, 1974, Associate Justice Potter Stewart vacated the stay of execution.

On February 15, 1974 the petitioner filed in the United States District Court for the Northern District of Ohio, Eastern Division, a petition seeking a writ of *habeas corpus*.

On February 22, 1974 the respondents filed a motion to dismiss the complaint.

On May 6, 1975 the District Court issued a Memorandum Opinion & Order denying the writ and dismissing the petition. The Court entered judgment accordingly.

A notice of appeal was filed on May 7, 1975.

On June 6, 1975 the District Court certified the existence of probable cause for an appeal.

On August 13, 1976, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court.

A petition for rehearing was denied on October 8, 1976.

The instant petition for a writ of *certiorari* was filed on November 17, 1976.

At p. 7 of the petitioner's Statement of the Case, petitioner's counsel, in an apparent attempt to pique the interest of this Court makes certain statements with respect to "local practice" and the indigency of his client at the time of trial.

This is the first time that the petitioner has attempted to raise an issue either directly, or indirectly with respect to the fact that no verbatim record was made of the trial proceedings.

At the time of his trial, the petitioner was represented by two retained attorneys of his own selection.

At no time did either the petitioner, or his counsel, raise the issue of indigency with the trial court, and at no

time was a court reporter requested by the petitioner or any member of his defense team.

If the petitioner was indigent at the time of his trial, it was an undisclosed and private indigency, because the Court was never advised of it.

The procedure filed by the trial court with respect to the providing of a court reporter was in full accord with the then existing law of the State of Ohio.

Respondents respectfully object to the emphasis (underlining) supplied by the petitioner to portions of certain lower court entries, without noting that the emphasis was his, and not that of the issuing court.

REASONS FOR DENYING THE WRIT

Rule 19(1) of the Rules of the Supreme Court provides that a review on writ of *certiorari* will be granted only where there are "special and important reasons" for so doing.

Counsel for the respondents respectfully submits that there are two principal reasons why a writ of *certiorari* should not issue in the instant action.

The first relates to the basis of the judgment entered by the United States Court of Appeals for the Sixth Circuit on August 13, 1976 (petition for rehearing denied October 8, 1976); the second to the law applied by that court in affirming the finding of the United States District Court that the decision of the Supreme Court of Ohio in the case of *Cincinnati v. Karlan*, 39 Ohio St. 2d 107, 314 N.E.2d 162 (1974), provided an authoritative, constitutionally limited construction of the "almost identical" ordinance of the City of Cleveland Heights, the plaintiff in the

criminal misdemeanor prosecution that was commenced in 1971.

The decision of the Court of Appeals was based not so much upon the merit or lack of merit of the errors assigned by the appellant-petitioner, but upon the fact that his counsel, who has represented him throughout these proceedings, failed to provide to it a record demonstrating the existence of said errors.

At p. 5 of its opinion the Court stated:

> "Finally, Thompson claims that the municipal judge failed to instruct the jury that it could convict only for constitutional 'fighting words.' If we had before us a transcript demonstrating that the jury was not so instructed, we would hold that the writ should have been granted because of the possibility that the jury convicted Thompson for protected speech. However, in the absence of a transcript of the court's instructions to the jury, and according to the state proceedings the presumption of regularity to which they are entitled, we have no alternative but to hold that Thompson has failed in carrying his burden of proving that the jury was not properly instructed.
>
> The responsibility of placing the charge before us was that of the appellant, and it would seem improper to place the onus of his not having done so on the appellees in this habeas corpus proceeding which attacks a judgment of conviction arising from a trial which was held more than four and one-half years ago." (Citations omitted) (Petitioner's Appendix C, pp. 9a-10a)

It should be noted that even the dissent of Circuit Judge McCree is not based upon the merits of Mr. Thompson's appeal, but upon that judge's belief that the

"presumption of regularity" given to the state court proceedings by the majority of the panel was not proper.

Judge McCree would have required the appellees-respondents to establish in the District Court the precise jury instructions given by the trial court, and to demonstrate that the instructions complied with law. (As noted by the trial court in its Statement of the Evidence (Petitioner's Appendix G, p. 28a) no court reporter had been requested and therefore no verbatim record was made of the trial proceedings. At no time has the petitioner claimed that his right to object to, or to request expansion of the trial court's statement as provided by Ohio law was ever exercised by his counsel. In actual fact, the statement filed by the trial court was originally drafted by petitioner's counsel, as provided by Ohio law, and was signed by the Court without the making, in respondents' opinion, of any fundamental changes.)

Respondents respectfully submit that if this Honorable Court were to grant the writ of *certiorari* sought by the petitioner, it would be supplied with a record no more complete than the one that the Court of Appeals had before it when it affirmed the judgment of the District Court, and that the same deficiencies that confronted the appellate court would also become apparent to this Court.

In claiming error by the Court of Appeals, the petitioner, for the first time, argues the applicability of 28 U.S.C. §2254(d) (Petitioner's Appendix I, pp. 34a-36a.) It is submitted that this subsection has no applicability to judgment rendered by the Court of Appeals.

At p. 24 of his brief, petitioner states that the District Court declared Section 931.01(a) of the Codified Ordinances to be "constitutionally deficient". From a reading of the citation provided (Petitioner's Appendix D, p. 17a)

it would appear that the petitioner has greatly embellished the statement (*dicta*) actually made by the court.

It is respectfully submitted that neither the record below, nor the holdings of cases cited by the petitioner support his argument that the appellate court erred in applying the "presumption of regularity" principle to the appeal that it heard.

As to the second reason for denying the writ of *certiorari* to the petitioner, the authoritative construction issue, the respondents can present this Court with no better argument than to submit the written opinion of the Court of Appeals. (Petitioner's Appendix C, pp. 7a-9a.)

The Court of Appeals held that although the narrowing construction contained in the case of *Cincinnati v. Karlan*, 39 Ohio St. 2d 107, 314 N.E.2d 162 (1974), had come three years after the petitioner's "verbal onslaught", the District Court was not precluded from finding that the construction had cured the overbreadth of the ordinance, and that it was not necessary for the Supreme Court of Ohio to construe the Cleveland Heights enactment where the District Court found it to be "substantially identical" with the ordinance at issue in the *Karlan* case.

The Court of Appeals also found other Ohio appellate decisions: *Columbus v. Schwarzwalder*, 39 Ohio St. 2d 61, 313 N.E.2d 798 (1974), and *Kent v. Kelley*, 44 Ohio St. 2d 43, 337 N.E.2d 788 (1975), to have construed other "similar" disorderly conduct ordinances.

The reasoning of the trial judge in the case of *Pritkin v. Thurman*, 311 F. Supp. 1400 (U.S.D.C., S.D. Fla., 1970), first cited by the appellate court in its opinion, is applicable to the facts of this case.

It is submitted that the paucity of cases on point is an indication of general acceptance by lawyers and courts of the fundamental nature of the proposition.

Before concluding, respondents' counsel would submit to this Honorable Court an additional reason why he believes that a writ of *certiorari* should not be issued in the instant case.

It is based upon the apparent reasoning of the Court in the case of *Stone v. Powell*, ... U.S. ....., 49 L. Ed. 2d 1067 (July 6, 1976).

In *Stone*, the Court took note of the "substantial societal costs" that must be paid when a state court criminal conviction is sought to be overturned on a collateral *habeas corpus* review in the federal courts. (The Court's attention is respectfully directed to footnote #31 in the *Stone* case.)

The *Stone* case dealt with the Fourth Amendment and the "exclusionary rule". The instant appeal relates to the First Amendment and the extent of petitioner's "freedom of speech".

Respondents recognize that *Stone* is not directly applicable to the petitioner's case, and that the federal court's *habeas corpus* jurisdiction in First Amendment cases should be as broad as is necessary in order to assure that innocent persons are not unconditionally incarcerated for utterances that are constitutionally protected.

And respondents are not arguing that the federal courts should cease to exercise *habeas corpus* jurisdiction with respect to reviewing state and municipal "disorderly conduct" and "disturbing the peace" enactments.

But where a criminal defendant has litigated an issue in the state courts, has exhausted his state court remedies

and then knowingly fails to exercise his right to petition for the issuance of a writ of *certiorari* by this Court, society should not have to pay the costs, as it has done so far in this case, of having the defendant launch a collateral attack, *via* the *habeas corpus* route, in the federal courts, and then to again seek a review by this Honorable Court of the very same issues that he could and should have timely presented upon direct review.

In the instant case the petitioner, on direct appeal, requested and received from the Supreme Court of Ohio a stay of execution of sentence, in order that he might file a petition for writ of *certiorari* with this Court.

Upon motion by the petitioner, and without objection by the City of Cleveland Heights, Associate Justice Potter Stewart continued the stay order until such time as the Court had ruled upon the petition that the petitioner stated that he was going to file.

But no petition for a writ of *certiorari* was filed and on February 8, 1974 Justice Stewart vacated his stay order (Respondent's Appendix, at p. 11.)

On February 8, 1974, the petitioner filed in the United States District Court for writ of *habeas corpus*.

Both the District Court, and the Court of Appeals have denied the petitioner's petition.

Given the history of this action there is no reason that society must continue to bear the costs of the petitioner's collateral attack. It is respectfully argued that the petitioner has had his day in court and that his constitutional rights have been fully protected.

CONCLUSION

It is respectfully argued that the petitioner has failed to demonstrate the existence of the special and important reasons that are necessary to secure a writ of *certiorari* from this Honorable Court, and that based upon the foregoing, the petition should be denied.

Respectfully submitted,

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APPENDIX

ORDER OF THE UNITED STATES SUPREME COURT VACATING STAY OF EXECUTION

(Dated February 8, 1974)

No. A-506

SUPREME COURT OF THE UNITED STATES

DANIEL THOMPSON,
Petitioner,
v.
CITY OF CLEVELAND HEIGHTS.

ORDER

A PETITION for writ of certiorari not having been timely filed in the above-entitled cause,

IT IS ORDERED that my order of December 11, 1973 (which continued the stay of execution of sentence granted by the Supreme Court of Ohio in case No. 73-771) be, and the same is hereby, vacated.

/s/ POTTER STEWART
Associate Justice of the Supreme Court of the United States.